

STATE OF MICHIGAN
COURT OF APPEALS

SHAHIN FAROKHRANY,

Plaintiff/Counter-Defendant-
Appellant,

v

MARLIN JACKSON,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

June 12, 2007

No. 268702

Washtenaw Circuit Court

LC No. 05-000570-NO

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order dismissing this case after plaintiff failed to appear for his deposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Both parties had difficulty obtaining discovery from one another. Plaintiff was unable to appear for his scheduled deposition because he had been detained by the Immigration and Naturalization Service (INS) for possible deportation. After the close of discovery, defendant filed a motion to dismiss. Rather than dismiss the case, the trial court ordered plaintiff, who was still being detained by the INS, to appear for his deposition within two weeks. When he did not appear, the court dismissed the case.

A trial court's decision to impose discovery sanctions is reviewed for an abuse of discretion. *Linsell v Applied Handling, Inc.*, 266 Mich App 1, 21; 697 NW2d 913 (2005). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

If a party fails to comply with a request for discovery, the requesting party may move for an order compelling discovery. MCR 2.313(A). If the party from whom discovery is sought fails to comply with the order, the court "may order such sanctions as are just," including dismissal of the action. MCR 2.313(B)(2)(c). If a party fails to appear for his deposition after proper notice, the court "may order such sanctions as are just," including dismissal of the action. MCR 2.313(D)(1). Such a harsh sanction is "generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727

(1999). Before imposing such a sanction, the court should consider various factors, including: (1) whether the party has a history of failing to provide discovery; (2) whether the party has a history of refusing to comply with other court orders; (3) whether the party has a history of deliberately delaying the proceedings; (4) whether the violation was willful or accidental; (5) whether the opposing party has been prejudiced; and (6) whether a lesser sanction would better serve the interests of justice. *Id.* at 26-27; *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994). “The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.” *Bass, supra* at 26.

We conclude that the trial court abused its discretion in this instance. The court never found that plaintiff was not actually in federal custody. Because plaintiff was in the custody of the INS, his failure to appear for his scheduled deposition was involuntary. Plaintiff was still in custody when defendant sought relief from the trial court. Under the circumstances, it was inappropriate for the court to order plaintiff to appear within two weeks when compliance with the order was then impossible, and then dismiss the case for failure to comply with the order.

Reversed and remanded for reinstatement of the case. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio